IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
v.	:	No. 04-2509
	:	
GEORGE LUNA	:	(Criminal Action No. 00-600-01)

ORDER-MEMORANDUM

AND NOW, this 19th day of July, 2005, the petitioner's pro se "Brieff [sic] in Support of Application for a 28 U.S.C. 2255" is denied for the following reasons:

The application for habeas corpus relief states that petitioner's sentence should be vacated for 1) ineffective assistance of counsel; 2) prolonged tactical delay between arrest and indictment; 3) withholding of exculpatory evidence amounting to prosecutorial misconduct; and 4) the use of false testimony. *See* petitioner's brief.

The latter three issues are procedurally barred because of the failure to raise them on direct review.[1] The petition does not acknowledge this failure or, correspondingly, does not attempt to show cause, prejudice, or actual innocence. *See Bousley v. United States*, 523 U.S. 614, 622 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that he is 'actually innocent.'") (citations omitted). Instead, petitioner's "Traverse to the Government's Response" contends that petitioner did "notify the Court" of the issues by sending the Clerk of this Court two letters listing the issues petitioner sought to present for review to the Court of Appeals. *See* Traverse at 4, 6-7, and Exh. A. This, however, does not overcome a

[1] On direct appeal, petitioner cited only two issues: whether he consented to the search of his tractor-trailer and, alternatively, whether he was subjected to an improper pat-down during the traffic stop. *United States v. Luna*, 2003 WL 21872392 (3d Cir., Aug. 8, 2003) (unpublished).

procedural default.[2] *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir., 2005) ("It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal.") (citations omitted).

A claim of ineffective assistance of counsel is properly presented for the first time on collateral review. *See Massaro v. United States*, 538 U.S. 500, 504 (2003) ("[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal."). The petition asserts that trial counsel was ineffective during a pre-trial evidentiary hearing[3] on a suppression motion because counsel did not adequately impeach a prosecution witness. It maintains, as argued at trial, that this particular witness, who was petitioner's counsel on his state charges, forged petitioner's signature to certain proffer letters and did not adequately represent petitioner's interests at proffer meetings. Petition at 3, 6. Specifically, the petition urges that had trial counsel "done an investigation into the past and present claims against [this witness] he would have been impeached as a witness and the outcome of this trial could have been different."[4] *Id.* at 8.

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[2] Moreover, the "pre-indictment" delay challenge was rejected at trial because "a twenty-month period is not inordinate given the complexity of the prosecution, the government's representation that it conducted additional investigation, procured additional evidence and added conspirators after the defendant's state arrest, a less-than-clear assertion of speedy trial rights by defendant, and no showing that his defense was impaired." *United States v. Luna*, 2002 WL 535514 at *2 (E.D. Pa. Apr. 10, 2002) (unpublished) (internal citations omitted).

[3] The three-day pre-trial hearing also considered and rejected claims of pre-trial delay and suppression of evidence seized from petitioner's tractor-trailer.

[4] The "past claims" were described in the petition as a "record of public discipline, one count of conspiracy to do an unlawful act and one count of assault and battery, He [sic] was suspended for two and a half years (1977) and three counts of failure to file federal tax returns." Petition at 7. The government's response characterizes the suspected convictions as "a 1973 conviction for conspiracy and assault and battery in the Common Pleas Court of Chester County,

"Ineffective assistance of counsel under *Strickland* [*v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)] is deficient performance by counsel resulting in prejudice[.]" *Rompilla v. Beard*, 125 S.Ct. 2456, 2462 (2005) (citations omitted). Deficient performance occurs if "counsel's representation fell below an objective standard of reasonableness." *Strickland* at 687. Prejudice is when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Ineffectiveness is not present here for two reasons.

First, the former convictions are not of the type that can be used for impeachment under *Federal Rule of Evidence 609*. Both were over 10 years old. *See Fed. R. Evid. 609(b)* (specifying 10-year time limit from date of conviction or release, whichever is later). Even if, *arguendo*, failure to file a tax return were a crime that "involved dishonesty" under *Fed. R. Evid. 609(a)(1)*, the probative value of the conviction must outweigh its prejudicial effect. *See Fed. R. Evid. 609(b)* (specifying 10-year limit "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."); *see also United States v. Agnew*, 407 F.3d 193, 197 (3d Cir. 2005) (declining to allow impeachment based on a 16-year old forgery conviction, which "of course, involves dishonesty", where the probative value was small). Here, the prior convictions were at least 20 years old, and a probative value/prejudice balancing favorable to petitioner was highly unlikely.

Second, prejudice was not shown. It cannot be said "that there is a reasonable probability

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PA and a 1974 federal conviction for failure to file income tax returns." Government's response. The "present claims" are presumably a reference to complaints petitioner previously reported to "the Chester Bar Assocoation [sic] of Philadelphia, to the Defender Association of Philadelphia and to multiple law firms." *Id.* At 6.

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. During extensive testimony on the authenticity of the two proffer letters, the government produced the individuals present in the room with petitioner, all of whom said they saw him sign the proffer letters.[5] Trial transcript, 4/2/01. Despite the testimony of the questioned documents examiner who testified that petitioner did not sign the contested proffer letter, *id.* at 133, the following finding was entered at trial. "The credible facts also establish that defendant entered into the letter agreement voluntarily, the provisions of the letter having been reviewed with him by the Assistant U.S. Attorney." Trial transcript 4/4/2001 at 8. Additionally petitioner "under the evidence knew and understood the contents of the letter and any proffer made by him to the Government was pursuant to the letter and to the [state] proffer letter, . . . which defendant does not contest having signed." *Id*. at 9. Since petitioner does not demonstrate how the outcome of the suppression hearing or trial would have differed without acceptance of the testimony of his former state counsel, he has not shown prejudice.

Our Court of Appeals has recently reemphasized that the trial court is required to grant an evidentiary hearing unless the record before it conclusively establishes that petitioner was not prejudiced by the alleged ineffective assistance. *See United States v. McCoy*, 410 F.3d 124, 135 (3d Cir. 2005); *see also* 28 U.S.C. § 2255 ("Unless the motion and the files and records of the case

5 In addition to petitioner's former counsel, the following so testified: Joe Carroll, first Assistant District Attorney for Chester County, PA, DEA Special Agent Robert Vesseliza, and Pennsylvania State Trooper Felix Acosta. In his "Traverse to the Government's Response," petitioner contends that the three government witnesses who testified to seeing him sign the proffer letter were mistaken as to the document he was signing.

conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon[.]"). Here, the request for an evidentiary hearing is denied because none of the facts offered equate with ineffective assistance of counsel.

Edmund V. Ludwig, J.